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In The

Supreme Court of the United States

ARTHUR J. MISISCHIA, D.M.D.,

Petitioner,

v.

ST. JOHN'S MERCY HEALTH SYSTEMS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this case, the Eighth Circuit affirmed the District Court's dismissal of Petitioner's civil RICO Complaint. The Eighth Circuit concluded that Petitioner's RICO claims could have been included in a state court action filed in 1994, and therefore, a claim including subsequent acts is barred. Petitioner's 2004 Complaint includes allegations that Respondents committed predicate acts of racketeering as recently as 2001 and 2002. The questions presented are as follows:

1. Whether the Separate Accrual Rule adopted by a majority of the circuit courts is the proper standard for determining when a civil RICO claim accrues and how the four-year statute of limitations is applied.

2. Whether a civil RICO Complaint which alleges predicate acts of racketeering occurring within four years prior to the filing of the lawsuit and causing injury to Petitioner states a claim for which relief may be granted, regardless of the fact that some earlier predicate acts committed more than four years prior to filing the RICO action could have been raised in a prior lawsuit.

3. Whether this Court's ruling in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) permits the dismissal of a civil RICO case where the Complaint alleges predicate acts that amount to or threaten the likelihood of continued criminal activity and new injuries occurring within the limitations period even if some earlier predicate acts could have been raised in a prior lawsuit.

PARTIES TO THE PROCEEDING

Petitioner

Arthur J. Misischia, D.M.D.

Respondents

St. John's Mercy Health System (formerly known as St. John's Mercy Medical Center).

St. John's Mercy Medical Center Foundation.

St. John's Mercy Health Care (formerly known as Unity Health System).

John J. Delfino, D.M.D.

John J. Delfino, D.M.D., P.C. (doing business as St. Louis Oral and Maxillofacial Surgeons).

John T. Farrell.

Michael W. Noble, D.M.D.

Mark F. Weber.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Arthur J. Misischia, D.M.D., respectfully petitions for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on August 8, 2006.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 457 F.3d 800 and is reprinted in the Appendix to the Petition ("App.") 1a-9a. The final order of the United States District Court for the Eastern District of Missouri is reported at 2005 U.S. Dist. LEXIS 43102 and is reprinted at App. 10a-27a.

JURISDICTION

The order issued by the Eighth Circuit on August 8, 2006 constitutes a final judgment. App. 1a-9a. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

FEDERAL STATUTE INVOLVED

The RICO statute, 18 U.S.C. §1961 *et seq.*, provides for civil remedies as follows: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court. . . ." 18 U.S.C. §1964(c). The prohibited activities include the following:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. §1962(c).

In Section 1961, "racketeering activity" is defined to mean numerous criminal acts chargeable under state law and acts indictable under provisions of Title 18, United States Code including: Section 1341 (mail fraud), Section 1343 (wire fraud), Section 1951 (interference with commerce, robbery, or extortion), and Section 1952 (relating to racketeering). 18 U.S.C. §1961(1). A "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of the statute and the last of which occurred within ten years after the commission of a prior act of racketeering activity. 18 U.S.C. §1961(5). Furthermore, RICO is to "be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, §904(a), 84 Stat. 947.

STATEMENT OF THE CASE

This case raises important, recurring questions relating to the application of the civil RICO statute of limitations, the meaning of this Court's opinion in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), and the split in the circuit courts regarding when a RICO action accrues. On August 27, 2004, Petitioner, Dr. Arthur

Misischia, filed a civil action in the district court charging the Respondents with violations of the RICO statute.[1] In his Complaint, Dr. Misischia specifically charges the Respondents with committing predicate acts of racketeering, violating 18 U.S.C. §1341, §1343, §1951, and §1952. (¶¶222-227).[2] Respondents are Petitioner's former employers St. John's Mercy Medical Center ("St. John's"), St. Louis Oral & Maxillofacial Surgeons, Ltd. ("O&MS"), Dr. Delfino and Dr. Noble (both of whom served as chairman of the hospital's oral surgery section), and Mr. Farrell and Mr. Weber (both of whom served as St. John's Chief Executive Officer).

Although the Eighth Circuit disposed of this lawsuit as a *res judicata* matter, it is not. If the Court had applied the correct RICO accrual rule, *res judicata* would not even be an issue. Petitioner's Complaint was summarily dismissed by the district court as a result of the court's misapplication of the RICO statute of limitations and *res judicata*. The Eighth Circuit did not correct the district court's serious errors and inconsistencies. The Eighth Circuit and district court rulings both relied upon an unrelated employment action filed by Dr. Misischia in Missouri state court in 1994, tried in 1998, and upheld on appeal. *See Misischia v. St. John's Mercy Medical Center*, 30 S.W.3d 848 (Mo. Ct. App. 2000) ("*Misischia I*").

Dr. Misischia brought the 2004 action in an effort to protect himself from the Respondents' continuing wrongful

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[1] Jurisdiction in the U.S. District Court was based on 28 U.S.C. §1331 and §1367 and 18 U.S.C. §1964.

[2] All (¶) numbers herein refer to paragraphs in Petitioner's August 2004 Complaint.

actions; he seeks redress for new harms inflicted by the Respondents. He alleges that the Respondents have engaged in a long-term pattern of racketeering activity beginning in the mid-1990s and continuing into 2004. In fact, his 2004 Complaint charges the Respondents with predicate acts of mail fraud and extortion during the years immediately prior to its filing. He alleges that starting in the mid-1990s, St. John's, along with certain officers and oral surgeons, entered into a scheme to corrupt the medical staff at a major metropolitan hospital. (¶221). He further alleges that the predicate acts committed by Respondents include performing unnecessary surgeries, fraudulent billing, and wrongful peer review of medical professionals. (¶¶78, 88, 89, 194, 200-201). In furtherance of their scheme, Respondents wrongfully fired another medical staff member in 1999 for raising patient and quality care concerns (¶¶199-201), sought kickbacks from disfavored doctors on the hospital staff (¶¶205-207), and unlawfully used the National Practitioners D. a Bank ("NPDB") as a weapon against doctors seeking improvements to quality controls and patient care. (¶¶121-140 and 181-183). The hospital misused the NPDB when it submitted a false and misleading report regarding Dr. Misischia and allowed the false statement to be reported from 1994 until at least 2003.

Petitioner alleges that he is the victim of additional new predicate acts in the form of extortion committed in 2001 and 2002. Despite a legal obligation to maintain truthful information with the NPDB, Respondents sent an extortionate letter through the U.S. mail on June 12, 2001, demanding – as conditions for correcting the NPDB report – that Dr. Misischia agree not to testify as an expert against or "bad mouth" the hospital, execute a general

release of the hospital, and pay monies to the hospital claimed to have been incurred in the earlier state court litigation. (¶165). On or about August 30, 2001, Respondents renewed their demand that Dr. Misischia agree not to serve as an expert witness against the hospital, again in return for amending the NPDB entry. (¶168). Then, on February 15, 2002, Respondents sent another letter through the U.S. mail demanding that Dr. Misischia comply with substantially the same terms, in return for the hospital's correction of its false NPDB report. (¶¶176-177). Dr. Misischia alleges that the letters in 2001 and 2002 were intended to extort from Dr. Misischia his contract rights to testify as an expert witness against Respondents in medical malpractice actions and the value of those contracts, causing new injuries to Dr. Misischia's business and property. (¶194).

Dr. Misischia incurred injuries as a result of the extortionate demands contained in the 2001 and 2002 letters. In order to protect himself from Respondents' continuing wrongful acts, Dr. Misischia was forced to retain counsel and seek correction of the false NPDB report through the legal system. (¶¶184-188). In 2002, he filed a Privacy Act suit against the U.S. Department of Health and Human Services ("DHHS"), which was partly successful in that it resulted in the government forcing St. John's to remove the term "positive" to describe Dr. Misischia's psychiatric evaluation. The change was mandated by the Secretary of DHHS who found that the NPDB report submitted by Respondents "indeed was inaccurate." (¶¶188-189); *Doe v. Thompson*, 332 F. Supp. 2d 124, 127 (D.D.C. 2004). He incurred substantial expenses in successfully procuring this amendment. (¶266).

Dr. Misischia further alleges that he suffered new injuries until at least April 2003 when the Respondents permitted the false NPDB report to be transmitted to third parties, including insurance companies and potential employers. (¶¶139-142). The RICO Complaint also alleges that the transmission of the false NPDB report interfered with Dr. Misischia's medical staff privileges at Barnes Jewish Hospital. (¶¶190-191). These injuries also include the expenditure of resources to respond to inquiries made by patients, colleagues, and various credentialing bodies regarding Dr. Misischia (¶260), as well as injury to his professional reputation (¶262).

These new injuries to his business and property were the direct result of predicate acts committed between 2001 and 2004, and thus obviously suffered in the four years prior to the filing of the 2004 Complaint.

The current action is not identical to the 1994 state court action, nor does it seek redress for the same harm. A simple comparison of the facts illustrates the differences.

A. Facts Underlying the 1994 State Court Action

In 1993 Dr. Misischia raised various patient and quality care concerns regarding medical treatment at St. John's, in general and specifically within the oral surgery section managed by Dr. Delfino. (¶¶67-75). These concerns included allegations of unnecessary surgeries and fraudulent billing. Later that year, Dr. Misischia's medical staff privileges at St. John's were suspended. (¶101). In the spring of 1994, at St. John's request, Dr. Misischia was examined by a psychiatrist. The psychiatrist found and reported negative indications that Dr. Misischia was

suffering from any type of behavioral or psychiatric disorder. (¶¶128-129). As a result of this evaluation, St. John's revoked the summary suspension. (¶131). Still, St. John's falsely reported to the NPDB that the psychiatric report was positive. (¶136). Additionally, in late April 1994, St. John's informed Dr. Misischia that he would be terminated effective July 25, 1994. (¶132). Dr. Delfino also terminated Dr. Misischia's employment contract with O&MS. (¶134). These events prompted Dr. Misischia to file a lawsuit against St. John's, Dr. Delfino and O&MS in the Circuit Court of the City of St. Louis (the "Missouri state court case").

B. The 1994 State Court Action

The Missouri state court case was filed in October 1994. The claims were conspiracy to maliciously prosecute (Count I), conspiracy to abuse process (Count II), retaliatory discharge (Count III), slander (Count IV), tortious interference (Count V), and conspiracy (Count VI) against all three defendants. He also brought claims for fraud (Count VII) against Dr. Delfino and O&MS. *Misischia I*, 30 S.W.3d at 856. Civil RICO was never raised nor litigated in the Missouri state court action.

The trial court dismissed Counts I, II, III, V and VI. Later, the trial court granted summary judgment in favor of St. John's on the slander claim (Count IV). The court ruled that because the allegations against the hospital involved a peer review action, St. John's was immune from damages under the slander count pursuant to the Health Care Quality Improvement Act (HCQIA), 42 U.S.C. §11101 *et seq.*, and not on the merits. *Id.* at 856-57.

The trial proceeded in February 1998 against Dr. Delfino and O&MS only. The jury ruled in favor of Dr. Misischia and against Dr. Delfino on the fraud claim and awarded Dr. Misischia a judgment of $265,000. *Id.* at 857. The trial court rulings were affirmed by the Missouri Court of Appeals, which also upheld the trial court's denial of St. John's motion for attorneys' fees "in light of St. John's minimal following of the standards set in section 11112(a)" of the HCQIA. *Id.* at 867.

C. The Rulings Entered Below on the 2004 RICO Action

On August 5, 2005, the district court issued a memorandum and order granting the Respondents' Rule 12(b)(6) motions to dismiss the 2004 Complaint. The district court's order listed numerous mailings and wire communications included in the 2004 Complaint as predicate acts of racketeering activity. App. 19a-20a. Nine of these predicate acts are dated in 2001, 2002, and 2003. App. 20a. Nevertheless, the district court concluded that, because Petitioner alleges that instances of mail or wire fraud occurred prior to the filing of his 1994 state court action, *all* of his RICO claims are barred by the doctrine of *res judicata*. App. 24a. The district court further held that all of the alleged injuries, including the dissemination of the NPDB report to third parties and the attempt to use that report to coerce his cooperation, occurred prior to August 27, 2000.[3] Consequently, the district court ruled that

[3] Petitioner submits that this conclusion misstates the allegations in his Complaint and contradicts the district court's own findings which were summarized in its memorandum and order, App. 19a-20a.

Petitioner's claims are barred by the RICO statute of limitations. App. 24a-25a.

On August 8, 2006, the Eighth Circuit affirmed the district court's dismissal of the RICO Complaint.[4] The Eighth Circuit found that the 2004 Complaint alleges predicate acts that occurred before he filed his 1994 state court action. The Court observed that those acts may or may not have been sufficient to state and prove a RICO action. App. 7a. Nevertheless, the Court ruled, "The RICO claims could have been raised in October 1994." *Id.* The Eighth Circuit also acknowledged that the 2004 Complaint alleges new predicate acts and injuries occurring in 2001 and 2002, but it summarily stated that those mailings were "unrelated to the events of 1993 and 1994." *Id.* As a result, the Court held that all of Dr. Misischia's claims were properly dismissed as barred by the doctrine of *res judicata*.

REASONS FOR GRANTING THE PETITION

I. This Court Should Set Forth a Uniform Rule For Accrual of RICO Actions Adopting the Separate Accrual Rule.

In *Rotella v. Wood*, 528 U.S. 549 (2000), this Court rejected the "injury and pattern discovery" rule and affirmed the summary judgment entered for the defendants in a civil RICO action. This Court held that where the plaintiff claimed damages resulting from his treatment at a psychiatric facility in 1986, his 1997 civil RICO action

[4] Jurisdiction before the U.S. Court of Appeals was based on 28 U.S.C. §1291.

was barred by the four-year statute of limitations. The Court noted, however, that:

> We need not and do not decide whether civil RICO allows for a cause of action when a second predicate act follows the injury, or what limitations accrual rule might apply in such a case.

Id. at 559, n.4. The instant case demonstrates the compelling need for the Supreme Court to provide guidance in this regard.

This Court has held that a four-year statute of limitations applies to civil RICO actions. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987). However, as the Second Circuit noted: "There is another, far more difficult part to the limitations problem: when did [the] civil RICO action accrue?" *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1101 (2d Cir. 1988). While this Court has attempted to bring clarity to the issue of when a plaintiff's civil RICO action is time-barred, its decisions in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) and *Rotella v. Wood*, *supra*, do not address whether a plaintiff can bring a RICO action where there are multiple predicate acts and multiple injuries over an extended time period. As a result, the "forest of confusion" surrounding civil RICO cases continues today. *See Klehr*, 521 U.S. at 197 (Scalia, J., concurring).

Petitioner submits that this Court should adopt the Separate Accrual Rule which has been recognized by a majority of the circuit courts. Moreover, he maintains that the failure of the Eighth Circuit to apply the Separate Accrual Rule constitutes reversible error and that this case should be remanded.

Justice Kennedy described the Separate Accrual Rule as "a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and other acts were committed outside the limitations period." *State Farm v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring). Applying the rule, the plaintiff insurance companies should have been permitted to recover damages for acts committed during the four-year period before the filing of the complaint, but not for damages occurring before that time. *Id.* By the Eighth Circuit's ruling, Dr. Misischia has been precluded from recovering damages for acts committed during the previous four-year period.

II. The Current State of RICO Law Has Caused Confusion and Inconsistent Rulings Between the Circuits.

With regard to the RICO statute, Congress has been notoriously reluctant to clarify when a claim for civil damages can be prosecuted and when a cause of action accrues. Consequently, this task has fallen to the federal judiciary. As early as 1985, this Court held that if the defendant engages in a pattern of racketeering activity and those activities injure the plaintiff in his business or property, the plaintiff has a claim under the RICO statute. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 (1985). In upholding the plaintiff's civil RICO claims, this Court concluded, "[I]f Congress' liberal-construction mandate is to be applied anywhere, it is in §1964, where RICO's remedial purposes are most evident." *Id.* at 491, n.10.

Two years later the Eighth Circuit, citing *Sedima*, affirmed the dismissal of a civil RICO action in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 829 F.2d 648 (8th Cir. 1987).

The Court held that the alleged bribery attempts were no more than a series of fraudulent acts committed in furtherance of a single scheme, thus not actionable under RICO. *Id.* at 650. Ultimately, this Court reversed the Eighth Circuit. Finding that most of the other circuits had rejected the Eighth Circuit's interpretation of a racketeering pattern, this Court instructed that a RICO action may be prosecuted for multiple predicate acts "within a single scheme" so long as the acts were related and amounted to (or threatened the likelihood of) continued criminal activity. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237 (1989). This Court added that a RICO complaint states a cause of action when it alleges that predicate acts had "continuity" and a "relationship" which combine to produce a pattern. *Id.* at 249. This Court expanded on what constitutes a pattern, explaining "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission. . . ." *Id.* at 239. This Court taught that because "legitimate businesses enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences," a pattern of racketeering need not require an organized crime nexus. *Id.* at 249. Finally, this Court cautioned that a RICO violation requires acts extending over a substantial period of time: "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct." *Id.* at 242.

In the *Agency Holding Corp.* case, *supra*, this Court adopted the four-year statute of limitations period, using the Clayton Act, 15 U.S.C. §15, as a guide. This Court, however, deferred for another day how the statute of

limitations accrues stating "we have no occasion to decide the appropriate time of accrual for a RICO claim." *Agency Holding Corp.*, 483 U.S. at 157. The unfortunate result is that several different accrual rules for civil RICO claims were developed in the various circuits.

Justice Scalia's prediction in his concurrence in *H.J., Inc.* that the circuits would be no more unified in the future on civil RICO matters has proven correct. *H.J., Inc.*, 492 U.S. at 255 (Scalia, J., concurring). In *Klehr v. A.O. Smith Corp.*, *supra*, Justice Breyer noted that the circuits had approved no fewer than three different rules in cases seeking to decipher the RICO statute of limitations, including the "last predicate act" rule, the "injury and pattern discovery" rule, and the "injury discovery" rule. *Klehr*, 521 U.S. at 185-86. Justice Scalia stated his preference for an "injury" rule, or that the cause of action accrues when a defendant commits an act that injures a plaintiff's business. *Id.* at 198 (Scalia, J., concurring). Finally, this Court threw out the "last predicate act" rule with *Klehr*. However, this ruling did not resolve "the mess that characterizes civil RICO accrual decisions." *Id.* at 197 (Scalia, J., concurring).[5]

The "injury and pattern discovery" rule previously favored by the Eighth, Tenth, and Eleventh Circuits was rejected by this Court three years later. In *Rotella v. Wood*, *supra*, Justice Souter writing for the unanimous Court held that the "injury and pattern discovery" rule did not govern the start of the limitations period for a civil RICO action. *Rotella*, 528 U.S. at 558-59. The *Rotella* Court held

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[5] This Court acknowledged that a "Separate Accrual" rule – which is similar to the "continuing violation" doctrine in antitrust – had been adopted by some circuits. *Klehr*, 521 U.S. at 190.

that a 1997 lawsuit was untimely because the injury suffered ended in 1986; just as the *Klehr* Court had found that an action filed in 1993 for the purchase of a defective silo in 1974 was barred by the statute of limitations. This Court, however, reserved for another day how it would deal with a case where new predicate acts or new injuries had occurred within the four-year limitations period. *Id.* at 559, n.4.

The lower courts have wrestled with the accrual issue continually, reaching different results.

III. The Majority of Circuit Courts Have Adopted the Separate Accrual Rule.

The Second, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits have all endorsed the Separate Accrual Rule.

In *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), the Second Circuit recognized the confusion among different courts regarding when a civil RICO action accrues. It held that each time a plaintiff suffers an injury caused by a violation of RICO, a cause of action to recover damages based on that injury accrues at the time he discovers or should have discovered that injury. *Id.* Citing this Court's decision in *Sedima*, the Second Circuit noted that there is no right to bring a RICO suit until an injury occurs, and a RICO action has not accrued until there is a right to sue. *Id.* The Second Circuit added that even after an initial injury has occurred, there may be additional, independent injuries that result from the predicate acts committed. "Multiple injuries, spread over time, frequently result from the very nature of a RICO violation." *Id.* at 1103. Noting that the right to sue is tied to an injury to the plaintiff's business or property, the *Bankers Trust*

court held: "The logical end result is that a plaintiff may sue for any injury he discovers or should have discovered within four years of the commencement of his suit, regardless when the RICO violation causing such injury occurred." *Id.*[6]

In *Love v. National Medical Enterprises*, 230 F.3d 765 (5th Cir. 2000), the Fifth Circuit applied the Separate Accrual Rule, finding that each time the plaintiff became obligated to pay a fraudulent insurance claim, the plaintiff suffered a new and actionable injury to its business or property. The Fifth Circuit held that because RICO, like the Clayton Act, is designed to address continuing violations and injuries: "[I]t would seem illogical to conclude that, under civil RICO, a plaintiff may not recover for injuries incurred within the limitations period, merely because they result from acts that are part of a continuing pattern of similar acts that caused other, similar injuries outside that period." *Id.* at 774. In adopting the Separate Accrual Rule, the *Love* court concluded that this rule is well-suited for cases in which a pattern of RICO activity is alleged to have caused a continuing series of similar, independent injuries. *Id.*

The Seventh Circuit also wrestled with the accrual issue, aptly noting that statutes of limitations tend to be more difficult to apply than to define. The Court observed that this is a question on which the other circuits and the district courts within the Seventh Circuit are "deeply divided." *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1454-55

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[6] *See also Bingham v. Zolt*, 66 F.3d 553, 559 (2d Cir. 1995); *Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., Inc.*, 2003 U.S. Dist. LEXIS 11096 at *9-10 (S.D.N.Y. 2003).

(7th Cir. 1992). The Seventh Circuit reversed the summary judgment entered for the defendants on the RICO claims, applying the Separate Accrual Rule. *Id.* at 1465. To further explain the point, the Seventh Circuit stated: "a civil RICO claim depends on the existence of an injury: as in playground basketball, the rule is 'No blood, no foul.' In civil RICO, each wrongful act that causes injury is a new cause of action, a new foul. . . ." *Id.* at 1466.

The Ninth Circuit has likewise adopted the Separate Accrual Rule. In *State Farm v. Ammann*, 828 F.2d 4 (9th Cir. 1987), the Court reversed summary judgment for the RICO defendants because the district court had improperly applied a three-year statute of limitations. In his concurrence, Justice Kennedy wrote that as to each injury, the civil RICO statute of limitations should begin to run when the plaintiff knows or has reason to know of the injury which is the basis of the action. Justice Kennedy reasoned that new overt acts occurring within the limitations period should be actionable under civil RICO; he also observed that the Separate Accrual Rule had not been announced by the Supreme Court. *Id.* at 5.

In *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996), the Ninth Circuit formally recognized the Separate Accrual Rule and found that a new cause of action accrues "for each new and independent injury, even if the RICO violation causing the injury happened more than four years before." *Id.* The Court added:

> Two elements characterize an overt act which will restart the statute of limitations: 1) It must be a *new and independent act* that is not merely

> a reaffirmation of a previous act; and 2) It must *inflict new and accumulating injury* on the plaintiff.

Id. at 513.

In *Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F.2d 817 (10th Cir. 1990), the Tenth Circuit voiced approval of the Ninth and Second Circuit rulings which recognized the Separate Accrual Rule. *Id.* at 820. Since then, one district court observed that the Tenth Circuit, like most circuits, has adopted the Separate Accrual Rule. *Cory v. Aztec Steel Building, Inc.*, 2005 U.S. Dist. LEXIS 39335 at *12-13 (D. Kan. 2005) (concluding that where there had been damages suffered in June 2001 (*i.e.*, less than four years prior to the filing of the plaintiff's lawsuit) the RICO claim as to those injuries were not barred by the statute of limitations).

The Eleventh Circuit also recognizes the Separate Accrual Rule. Indeed, the Court applied the rule in a case holding that, where the plaintiff had alleged independent subsequent injuries resulting from the mismanagement, diversion, and wrongful sale of corporate assets, some of the plaintiff's civil RICO claims were not time-barred. *Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546 (11th Cir. 1990). The Court concluded:

> If, at a later date, a new and independent injury is incurred from the same RICO violation, the plaintiff is again "injured in his business or property" and his right to sue for damages accrues at

> the time that he discovered or should have discovered the new injury.

Id. at 1552 (quoting *Bankers Trust*, 859 F.2d at 1103).[7]

IV. Confusion Over the Accrual of Civil RICO Actions Continues in the Remaining Circuits.

Although the majority of circuits have adopted the Separate Accrual Rule, the other circuits have reached inconsistent rulings as to whether or when a civil RICO action can be brought where there is continuing racketeering or a new injury to business or property alleged.

In an opinion written by Justice Breyer, the First Circuit followed the holding of the Second Circuit in the *Bankers Trust* case and held that the accrual of a RICO action is tied to the time a plaintiff knew or should have known of his injury. *Rodriguez v. Banco Central*, 917 F.2d 664, 665 (1st Cir. 1990). In *Rodriguez*, the plaintiffs claimed that they were defrauded by the defendants when they purchased real estate in Florida which turned out to be swampland. The Court remanded the case to the district court to determine whether the plaintiffs' claims were filed within four years of the discovery of their injury. The First Circuit, however, was silent as to what accrual rule would apply in a case where there was more than one injury claimed.

In the months after this Court issued its decision in *Rotella*, the First Circuit reiterated its approval of a rule

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[7] Although *Bath* and *Bivens Gardens* were abrogated by *Rotella*, the Tenth and Eleventh Circuits continue to apply the Separate Accrual Rule in multiple injury cases.

establishing the accrual of a civil RICO action as when a plaintiff discovered or should have discovered his injury. *The Lares Group, II v. Tobin*, 221 F.3d 41, 44 (1st Cir. 2000). The First Circuit noted that *Rotella* did not address whether civil RICO allows for a cause of action when a second predicate act follows the injury, and cautioned "We follow suit here, leaving open the possibility that a different accrual rule may apply where a plaintiff's injury does not complete her cause of action." *Id.* at 45. The Court declined to speculate what alternative accrual rule might apply in such a case.

In *Annulli v. Panikkar*, 200 F.3d 189 (3d Cir. 1999), the Third Circuit affirmed summary judgment in favor of the defendants in a RICO case that was decided after this Court's ruling in *Klehr*, but before a final decision had been issued in *Rotella*. The Third Circuit concluded that the plaintiffs had not produced any evidence showing that the defendants had engaged in predicate acts of racketeering within the statutory period, and held that any torts or breaches of contract committed against plaintiffs did not constitute predicate acts under RICO. *Id.* at 202. However, the question as to whether actual predicate acts of racketeering perpetrated within four years of the plaintiffs' lawsuit would have changed the Court's ruling was left unresolved in *Annulli*.

The Fourth Circuit did not discuss the Separate Accrual Rule by name, even in the wake of the *Klehr* and *Rotella* decisions; rather it stated that the four-year RICO statute of limitations runs from the date when the plaintiff discovered or should have discovered the injury. *Potomac Electric Power Company v. Electric Motor and Supply, Inc.*, 262 F.3d 260, 266 (4th Cir. 2001). The Fourth Circuit reversed in part the district court's summary judgment for

the defendants because the plaintiff had shown that it had suffered some injury to its property, and remanded the case to the district court to determine when plaintiff knew or should have known about each alleged incident of fraud. The Fourth Circuit concluded "the application of the statute of limitations essentially turns on the question of whether, *with respect to each alleged injury*," plaintiff "knew or should have known of its injury" more than four years before filing suit. *Id.* (*emphasis added*).

The Sixth Circuit found, in a pre-*Rotella* decision, that a civil RICO cause of action begins to accrue when a plaintiff discovers, or should have discovered, the existence of his injury and that the injury resulted from a pattern of racketeering. In *Isaak v. Trumbull S&L Co.*, 169 F.3d 390 (6th Cir. 1999), the Court reviewed a RICO case in which the plaintiffs alleged that they had been defrauded in connection with their purchase of timeshare resorts in Ohio. The Sixth Circuit affirmed summary judgment for the defendants, concluding that the plaintiffs had suffered the injury to their property interests more than four years before and that the RICO claim was barred. *Id.* at 399. However, the Sixth Circuit did not address which rule of accrual applies if the plaintiffs had alleged injuries within the four-year limitations period.[8]

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[8] Although the Sixth Circuit has not adopted the Separate Accrual Rule, one district court in that circuit very recently endorsed the rule. *Trollinger v. Tyson Foods, Inc.*, 2006 U.S. Dist. LEXIS 17448 (E.D. Tenn. 2006) (citing *James v. McCoy*, 56 F. Supp. 2d 919, 933-4 (S.D. Ohio 1998)). The court acknowledged that determining when a civil RICO cause of action accrues has been a source of confusion. *Trollinger*, 2006 U.S. Dist. LEXIS at *8. It further observed that although the Sixth Circuit had not specifically applied the Separate Accrual Rule in

(Continued on following page)

Finally, the D.C. Circuit, like the Sixth Circuit, has not adopted or rejected the Separate Accrual Rule. The result has been that judges in the District Court for the District of Columbia have reached differing results on the RICO accrual question. In *Solano v. Delmed, Inc.*, 759 F. Supp. 847 (D.D.C. 1991), a RICO action brought by investors in a medical services center was dismissed, where the closing date of the acquisition was December 1983 and the RICO action was filed in June 1988. In this single injury RICO case, the district court held that plaintiffs knew or should have known that they could file suit for alleged violations of RICO prior to June 1984. *Id.* at 854-55. In contrast, another judge on the same district court found, in a similar misrepresentation case over a multi-year period, that certain of the RICO claims were timely. *Filloramo v. Johnston, Lemon & Co.*, 700 F. Supp. 572, 573 (D.D.C. 1988). The district court ruled, where transactions continued until 1986 and the lawsuit was filed on May 28, 1987, the plaintiff's RICO claims were timely for all transactions that occurred after May 28, 1983. *Id.* at 580. A full reading of these cases reveals the important distinction between single injury and multiple injury cases.

V. The Eighth Circuit's Ruling in the Instant Case Illustrates the Need for a Uniform Rule on the Accrual of Civil RICO Actions and Highlights the Conflict Between and Within the Circuits.

In the opinion and order issued below, the Eighth Circuit affirmed the dismissal of the Petitioner's lawsuit

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RICO cases, it had applied a comparable rule in antitrust cases under the Clayton Act. *Id.* at *17.

on *res judicata* grounds. The Court, however, did not find that the RICO claims had been litigated in the prior state court lawsuit; rather, the Court found that the RICO claims "could have been raised" in October 1994. App. 7a. Although the decision was couched in terms of *res judicata* law, it necessarily required an analysis of when a RICO cause of action accrues. Therefore, the interpretation of when a RICO action accrues and when the statute of limitations starts to run are at the core of the Court's analysis in this case. Indeed, Petitioner fully briefed this issue below and urged the Eighth Circuit to adopt the Separate Accrual Rule as applied in the majority of circuits. In fact, had the Eighth Circuit properly followed the Separate Accrual Rule, *res judicata* would not apply.

Petitioner submits that even if he could have filed a good faith RICO action in October 1994, his 2004 Complaint raises predicate acts and injuries that could not have been raised, or even contemplated, at the time of the filing of his 1994 state court action. Despite the implications made in the Eighth Circuit's ruling, a plaintiff does not have only one opportunity to bring a RICO action where racketeering activity continues and plaintiff suffers new injuries. Rather, as many circuit courts have explicitly stated (and other circuits seemingly recognize), where a racketeering enterprise continues to victimize a plaintiff with new predicate acts and the plaintiff continues to suffer new injuries, a new cause of action accrues under civil RICO. This is the Separate Accrual Rule.

In fact, the decision below underscores the Eighth Circuit's apparent confusion over the accrual of civil RICO actions. Certainly, it would have been impossible for the Petitioner to include in a 1994 lawsuit his allegations of predicate acts and injuries occurring in 2000 and

thereafter. Quite obviously, the 2001 and 2002 letters had not been mailed. Moreover, in 1994, Dr. Misischia had not been required to defend his medical staff privileges at another hospital, he had not suffered injury to any expert witness contracts, he had not incurred on-going harm to his professional reputation, and he had not incurred significant attorneys' fees in seeking relief from DHHS. Thus, the Eighth Circuit erred in finding that a RICO action could have been brought in 1994, and that there are no circumstances under which Dr. Misischia could later sue under the RICO statute. Because Dr. Misischia has suffered new harm related to continuing racketeering acts, he should be allowed to seek redress for his new injuries.[9]

It is clear that the Eighth Circuit, like other courts, has struggled over the past two decades in its interpretation of civil RICO. For example, in *H.J., Inc.*, 492 U.S. 229 (1989), this Court, reading the complaint in the light most favorable to petitioner, reversed the Eighth Circuit's dismissal of a RICO action, instructing, "petitioners may be able to prove that the multiple predicates alleged constitute 'a pattern of racketeering activity,' in that they satisfy the requirements of relationship and continuity." *Id.* at 250. Then in 1997, this Court's decision in *Klehr* affirmed the Eighth Circuit's dismissal of a RICO claim as

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[9] The decision below also conflicts with the Eighth Circuit's own *res judicata* decisions. *See Lundquist v. Rice Memorial Hospital*, 238 F.3d 975 (8th Cir. 2001) (claim for wrongful termination was not barred by *res judicata* because that claim did not exist when a prior Americans with Disabilities Act claim had been filed). *See also Baker Group v. Burlington Northern and Santa Fe Railway Co.*, 228 F.3d 883, 886 (8th Cir. 2000) (Judge Loken wrote: "It is well settled that claim preclusion does not apply to claims that did not arise until *after* the first suit was filed.")

barred by the statute of limitations. Three years later, however, the *Rotella* case rejected the "injury and pattern discovery" rule that had been applied by the Eighth Circuit for almost a decade. Finally, the *Rotella* court expressly withheld for another day how it would address a situation where, as in the instant case, a civil RICO claim involves later predicate acts and multiple injuries suffered by the plaintiff. *Supra* at 10.

That day has come. Until this final piece of the RICO accrual puzzle is resolved by this Court, the confusion over when and how to prosecute a civil RICO action will continue unabated. As Justice Scalia aptly stated in *Klehr*: "As a practical matter, a 4-year statute of limitations means nothing at all unless one knows when the four years start running." *Klehr*, 521 U.S. at 199.

The decision below also contradicts earlier decisions within the Eighth Circuit. In the instant case, the Eighth Circuit ruled that a state court lawsuit initiated in 1994 precluded the filing of any RICO claims based on later predicate acts and injuries. However, that ruling is difficult to reconcile with the Eighth Circuit's prior decision in *Granite Falls Bank v. Henrikson*, 924 F.2d 150 (8th Cir. 1991). In *Granite Falls Bank*, the Court acknowledged the express mandate from Congress that RICO be liberally construed to effectuate its remedial purposes. *Id.* at 153. In addition, the Court recognized that a RICO cause of action should accrue "with respect to each independent injury to the plaintiff." *Id.* at 154. It appears that in 1991 that the Eighth Circuit was agreeable to the proposition that later injuries to a plaintiff within the limitations period would be actionable. This tacit approval of the Separate Accrual Rule leaves no doubt that the Eighth Circuit's decision in the instant case conflicts with

previous decisions in the Eighth Circuit and with rulings in the other circuits.[10]

At least one district court within the Eighth Circuit lends further support for finding that the Separate Accrual Rule should be applied where predicate acts and new injuries occur within the four-year period before a RICO action is filed. In *Wal-Mart Stores, Inc. v. Watson*, 94 F. Supp. 2d 1027 (W.D. Ark. 2000), a district court denied defendant's motion to dismiss a civil RICO action where the plaintiff retailer alleged that it had paid inflated prices for merchandise and suffered injury to its business as a result of kickbacks received by one of its former apparel buyers. The district court concluded that, in light of the decision in *Rotella*, the appropriate accrual rule would be the "injury discovery" rule. *Id.* at 1033. In addition, it further recognized that under the Ninth Circuit's analysis, the "injury discovery" rule included the Separate Accrual Rule which holds that "a new cause of action accrues for each new and independent injury, even if the RICO violation causing the injury happened more than four years before." *Id.* (quoting *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996)). The district court further noted that in *Sedima* this Court made it clear that RICO injuries flow from the individual predicate acts, not from the pattern of racketeering itself. *Id.* at n.3. Logic dictates that where a RICO plaintiff has alleged that predicate acts were committed and injuries were suffered within four years of filing suit, and well after his state causes of action were

[10] This Court's rejection of the "injury and pattern" discovery rule does not disturb the Eighth Circuit's prior findings that later injuries would be actionable.

tried, he has stated a claim for which relief may be granted.

The ongoing conflict within the Eighth Circuit further illustrates the dire need for additional guidance from this Court.

VI. The Eighth Circuit's Decision Below Ignores this Court's Ruling In *H.J., Inc. v. Northwestern Bell Tel. Co.*

Dr. Misischia maintains that the Respondents' misconduct continued until at least 2004. According to the 2004 Complaint, the Respondents wrongfully fired complaining staff members, sought kickbacks from disfavored members of the hospital staff, fraudulently billed patients, and unlawfully used the NPDB as a weapon against those doctors who sought to improve quality controls and patient care, including him. He further claims that he was injured by the refusal of the Respondents to correct the false and misleading NPDB report entered against him despite a legal obligation to do so, and by their continued communication of false information regarding his medical competence to third parties. He also alleges his employment rights have been negatively affected by the false NPDB entry. Moreover, Dr. Misischia alleges that in 2001 and 2002, this pattern of racketeering continued when the Respondents sent him extortionate letters seeking monetary payments and promises that he not act as a witness in medical malpractice actions against them. He also charges that he incurred significant legal fees in his attempts to stave off these illegal demands, correct the false NPDB entry, and to protect his lawful right to testify on behalf of patients who have been injured as a result of the Respondents' medical malpractice. These injuries and

predicate acts could not possibly have been anticipated or litigated in 1994 and cannot possibly be considered barred by *res judicata*.

Dr. Misischia's 2004 Complaint includes exactly the types of allegations that are actionable under civil RICO in conformity with this Court's decision in *H.J., Inc. v. Northwestern Bell Tel. Co. Supra* at 12. In *H.J., Inc.* this Court, reversing the Eighth Circuit's dismissal of a RICO complaint, emphasized:

> Congress had a more natural and commonsense approach to RICO's pattern element in mind, intending a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity.

H.J., Inc., 492 U.S. at 237.

It is questionable whether Dr. Misischia could have brought a RICO case against the Respondents as early as 1994. Indeed, it is entirely plausible that a court would have found that Respondent's misdeeds at that time did not present or threaten on-going criminal activity. Moreover, even if he could have brought a RICO action in 1994, he should not be barred from seeking redress for the predicate acts committed and the injuries he suffered between August 2000 and August 2004.

In short, the 2004 Complaint states a claim for which relief can be granted. If this Court formally adopts the Separate Accrual Rule, there is no question that Dr. Misischia's 2004 Complaint is viable because he alleges

new and independent injuries within the previous four-year period.

Significantly, Petitioner's allegations must be construed as true at this stage of the litigation. As this Court noted in *H.J., Inc.*:

> Because respondents prevailed on a motion under *Federal Rule of Civil Procedure 12(b)(6)*, we read the facts alleged in the complaint in the light most favorable to petitioners. And we may only affirm the dismissal of the complaint if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."

Id. at 249-50 (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). The Eighth Circuit's conclusion that these later acts and injuries are "unrelated" to prior predicate acts is without merit, especially where there has been no evidence presented by the parties at this early stage of litigation. Furthermore, the Eighth Circuit blatantly disregarded this Court's previous directions on civil RICO in *H.J., Inc.* In that case, this Court held that liability under RICO depends on whether the threat of continuity of predicate acts can be demonstrated. *Id.* at 242. Petitioner alleges predicate acts committed within the limitations period which caused him new and independent injuries; as such the Eighth Circuit's unsupported assertion that the most recent predicate acts are "unrelated" to earlier misconduct is not sustainable. The Eighth Circuit's ruling disregards this Court's decision in *H.J., Inc.* and violates the clear intent of Congress in enacting RICO.

CONCLUSION

The majority of circuit courts have adopted the Separate Accrual Rule allowing a new cause of action to accrue under civil RICO when predicate acts are committed and injuries to the plaintiff's business or property are suffered within the four-year limitations period. Confusion continues to plague the lower courts in their handling of civil RICO cases. In particular, the Eighth Circuit has been perplexed over the accrual of civil RICO actions, and it erred by barring all of Petitioner's RICO claims which allege predicate acts and injuries within the four-year limitations period. In *Rotella v. Wood*, this Court declined to decide whether RICO allows a cause of action where a second predicate act follows the claimant's initial RICO injury. While the majority of lower courts have made it clear that such a RICO cause of action is permissible, this Court's sage guidance is necessary to stem the continued confusion on this critical issue. Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 2, 2006

457 F.3d 800

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-3403

ARTHUR J. MISISCHIA, DR., D.M.D.,	*	
Plaintiff-Appellant,	*	Appeal from the United States District Court for the Eastern District of Missouri
v.	*	
ST. JOHN'S MERCY HEALTH SYSTEMS, et al.,	*	
Defendants-Appellees.	*	

Submitted: April 17, 2006
Filed: August 8, 2006

Before LOKEN, Chief Judge, LAY and BYE, Circuit Judges.

LOKEN, Chief Judge.

At the conclusion of largely unsuccessful litigation in other courts, Dr. Arthur Misischia commenced this action against his former employers, St. John's Mercy Health Systems (St. John's) and Dr. John Delfino, and three St. John's supervisory employees. Misischia asserted claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(b)-(d), and a pendent state law conspiracy claim. The district court[1] dismissed

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[1] The HONORABLE CAROL E. JACKSON, Chief Judge of the United States District Court for the Eastern District of Missouri.

the claims on res judicata and statute of limitation grounds. Misischia appeals. Reviewing the district court's dismissal of the complaint *de novo,* we affirm. *See Ballinger v. Culotta,* 322 F.3d 546, 548 (8th Cir. 2003) (standard of review).

I. Background

In 1993, Delfino was the director and Misischia was the associate director of the oral and maxillofacial surgery residency program at St. John's hospital in St. Louis. Misischia also performed surgeries at St. John's hospital as an independent contractor retained by Delfino's professional corporation. Following reports of inappropriate patient contacts, St. John's terminated Misischia as associate director and suspended his staff privileges in October 1993. Delfino also terminated his separate contract with Misischia. As required, St. John's reported Misischia's suspension to the Department of Health and Human Services National Practitioner Data Bank [NPDB] in February 1994. At St. John's request, Misischia underwent a psychiatric evaluation in March 1994 that revealed no disorder. St. John's then ended the suspension and revised its adverse action report to the NPDB to read: "Based on the receipt of a positive [psychiatric] evaluation, the summary suspension of Dr. Arthur Misischia has been revoked effective April 25, 1994." However, St. John's also terminated Misischia's employment contract and staff privileges.

In October 1994, Misischia filed a lawsuit in Missouri state court against St. John's and Delfino, asserting various state law tort claims based on the allegation that Misischia's suspension, termination, and the adverse NPDB report were retaliation for his efforts to "blow the

whistle" on fraudulent activity by Delfino and St. John's. The trial court held that St. John's was immune from suit under the Health Care Quality Improvement Act, 42 U.S.C. §§ 11101 *et seq.*, and dismissed some claims against Delfino. A jury then found in favor of Misischia and against Delfino and his professional corporation on a fraud claim. The decision was affirmed on appeal and final judgment entered in December 2000. *See Misischia v. St. John's Mercy Med. Ctr.*, 30 S.W.3d 848 (Mo. Ct. App. 2000).

In March 2001, counsel for Misischia wrote St. John's offering to release all claims if St. John's would submit a revised NPDB report deleting the reference to a psychiatric evaluation. St. John's responded, agreeing to submit the revised report if Misischia also agreed not to serve as a retained expert in lawsuits against St. John's and to pay an amount in satisfaction of St. John's pending motion for costs in the state court action. Protracted, unsuccessful negotiations ensued. In this action, Misischia alleges that defendants sought to discredit him by submitting an inaccurate NPDB report in 1994 and then refused to correct the inaccuracies in 2001 unless he acceded to their "extortionate" demands.

In March 2002, with negotiations at a standstill, Misischia filed a "subject statement" with the Department of Health and Human Services objecting to the content and accuracy of St. John's revised NPDB report. The agency concluded that the phrase "positive evaluation" in St. John's revised report could be misinterpreted as implying that Misischia suffers from a psychiatric disorder. Accordingly, St. John's amended the report to read: "Based on the receipt of an evaluation that found that Dr. Arthur Misischia was not suffering from any type of psychiatric disorder, the summary suspension of Dr.

Arthur Misischia has been revoked effective April 25, 1994." However, the agency rejected Misischia's demand to delete all reference to a psychiatric evaluation. Misischia sued the agency alleging a violation of the Privacy Act, 5 U.S.C. § 552a. The District of Columbia District Court dismissed the suit as time-barred, concluding that the Privacy Act's two-year statute of limitations began to run when St. John's revised the NPDB report in May 1994. *Doe v. Thompson,* 332 F. Supp. 2d 124 (D.D.C. 2004).

Ten days later, Misischia filed this lawsuit. His lengthy amended complaint first describes every aspect of the parties' dispute from 1993 to 2003 and then alleges "various adverse professional incidents" involving other physicians with privileges at St. John's hospital. The amended complaint alleges that defendants collectively constituted an "enterprise," that their wrongful actions constituted a "pattern of racketeering activity," and that the mailings and interstate wire communication cited in the complaint were "predicate acts" under RICO. In addition to three RICO counts, Misischia asserts a state law civil conspiracy claim. The remedies sought include an order declaring that defendants "improperly and without justification" compelled Misischia to undergo a psychiatric examination, submitted an adverse report to the NPDB, terminated his employment and staff privileges, and damaged his reputation in order to taint his testimony as an adverse expert witness in lawsuits against the hospital.

II. Res Judicata

The district court held that the doctrine of res judicata or claim preclusion bars Misischia's RICO and civil conspiracy claims because he could have raised those claims

in his October 1994 state court suit. Though RICO is a federal statute, the preclusive effect of this prior state court judgment is governed by the law of Missouri, the State in which the judgment was rendered. *See Marrese v. Am. Acad. of Orthopaedic Surgeons,* 470 U.S. 373, 380 (1985).

Under Missouri law, a prior judgment bars a subsequent claim arising out of the same group of operative facts "even though additional or different evidence or legal theories might be advanced to support" the subsequent claim. *Chesterfield Village v. City of Chesterfield,* 64 S.W.3d 315, 320 (Mo. banc 2002) (quotation omitted). The doctrine of claim preclusion bars not only the claims asserted in the first action but also claims "which the parties, exercising reasonable diligence, might have brought forward at the time." *Id.* at 318 (quotation omitted); *see McNeill v. Franke,* 84 F.3d 1010, 1012 (8th Cir. 1996). Thus, the critical question here is whether Misischia *could have raised* his RICO and civil conspiracy claims in the prior state court suit. The district court answered this question in the affirmative. The court listed ten letters and wires sent by defendants between August 1993 and July 1994 that are alleged by Misischia to be RICO predicate acts and then explained:

> To state a RICO claim, plaintiff must show (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. . . . Mail fraud and wire fraud are among the predicate acts that can form the basis of a RICO claim. Plaintiff's amended complaint identifies several instances of alleged mail or wire fraud that occurred before he filed [the state court action]. His allegation of additional acts after the disposition of [that action] does not alter the fact that the basis for his

racketeering claim existed during the pendency of that prior case.

On appeal, Misischia first argues that res judicata bars only claims *identical* to those raised in the prior lawsuit. He relies on cases properly holding that res judicata does not bar claims that did not *exist* when the prior judgment was entered. *See generally Baker Group, L.C., v. Burlington N. & S.F. Ry.*, 228 F.3d 883, 885-87 (8th Cir. 2000). But that is a different issue. The argument that only identical claims are precluded is directly contrary to *Chesterfield* and other Missouri cases holding that res judicata bars a claim that *could have been raised* in the first lawsuit.

Misischia next argues that he could not have raised his RICO claims in the state court suit because (a) the ten predicate acts that occurred in the year prior to October 1994 were insufficient to prove the requisite pattern of racketeering activity needed to sustain a RICO claim, and (b) defendants committed additional predicate acts causing new injuries after the 2000 judgment in the state court case, namely, the "extortionate" demands in 2001 and 2002 that compelled Misischia to incur legal fees to challenge the false NPDB report. We disagree.

A "pattern of racketeering activity" is defined (rather unhelpfully) in 18 U.S.C. § 1961(5). Before Misischia filed his state court lawsuit, the Supreme Court construed the term as requiring proof of related racketeering predicates that pose a threat of continued criminal activity. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Applying this standard, we had affirmed the dismissal of RICO claims based upon predicate acts occurring over a short period of time and threatening no future criminal

conduct. *See Thornton v. First State Bank of Joplin,* 4 F.3d 650 (8th Cir. 1993); *Lange v. Hocker,* 940 F.2d 359 (8th Cir. 1991). Here, Misischia's amended RICO complaint alleged ten predicate acts that occurred in the year before he filed the state court action in October 1994. Those acts may or may not have been sufficient to state and prove a RICO violation. But they caused the bulk of Misischia's alleged injuries – wrongful suspension, a psychiatric evaluation, termination, and the filing of a false NPDB report – and the alleged predicate acts occurring thereafter added little if anything to his RICO claims. Thus, whether or not sound, the RICO claims could have been raised in October 1994.

In particular, the three "extortionate" letters exchanged with counsel for St. John's in 2001 and 2002, on which Misischia places great emphasis, were so unrelated to the events of 1993 and 1994 as to add nothing to the showing that the earlier acts reflected "a threat of continued racketeering activity," the prerequisite of a RICO claim under *H.J., Inc.,* 492 U.S. at 242. In these circumstances, we agree with the district court that Misischia's RICO claims-and likewise his state law civil conspiracy claim-could have been raised in the state court suit and are therefore barred by the prior state court judgment. The question is not whether the alleged predicate acts occurring after the state court judgment would support an independent RICO claim. The question is whether adding those predicate acts to the acts occurring in 1993 and 1994 can revive RICO claims that are otherwise barred. "The doctrine of res judicata would become meaningless if a party could relitigate the same issue . . . by merely positing a few additional facts that occurred after the initial

suit." *Dubuc v. Green Oak Township,* 312 F.3d 736, 751 (6th Cir. 2002).

III. Other Issues

Having concluded that the district court properly dismissed all of Misischia's federal and state claims with prejudice as barred by the doctrine of res judicata, we need not consider the court's alternative holding that the RICO claims are barred by RICO's four year statute of limitations. *See generally Rotella v. Wood,* 528 U.S. 549 (2000); *Klehr v. A.O. Smith Corp.,* 521 U.S. 179 (1997); *Love v. Nat'l Med. Enters., Inc.,* 230 F.3d 765, 772-75 (5th Cir. 2000); *In re Merrill Lynch Ltd. P'Ships Litig.,* 154 F.3d 56, 58-60 (2d Cir. 1998).

Misischia further argues that the district court abused its discretion in denying him leave to amend his complaint. This contention is without merit. In the district court, Misischia raised this issue with a one line request in his brief opposing defendants' motion to dismiss: "in the alternative, should the Court disagree with Plaintiff, Plaintiff respectfully requests leave to amend his Complaint." He made no motion for leave to amend and did not explain the substance of his proposed amendment. Thus, there was no abuse of discretion. *See United States ex rel. Lee v. Fairview Health Sys.,* 413 F.3d 748, 750 (8th Cir. 2005). Misischia also argues that the district court erred in denying his motion to disqualify St. John's attorneys. As the entire lawsuit was properly dismissed with prejudice, this issue is moot.

Defendants filed motions for sanctions under Rule 38 of the Federal Rules of Appellate Procedure and for an award of attorneys fees under 28 U.S.C. §§ 1912 and 1927,

asserting that Misischia's appeal is frivolous. Under Rule 38, an appeal is frivolous "when the result is obvious or when the appellant's argument is wholly without merit." *Newhouse v. McCormick & Co.,* 130 F.3d 302, 305 (8th Cir. 1997) (citations omitted). Here, while Misischia's attempt to prolong a dispute already litigated in multiple forums is hardly worthy of praise, the res judicata and statute of limitations issues are subject to reasonable dispute, and if Misischia had prevailed on his broadest contentions, the RICO claims could have gone forward against all defendants. Accordingly, we deny the motions.

The district court's order of dismissal dated August 5, 2005 is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DR. ARTHUR J. MISISCHIA, DMD,	)	
Plaintiff,	)	No. 4:04-CV-1161 (CEJ)
vs.	)	
ST. JOHN'S MERCY HEALTH, SYSTEM, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

(Filed Aug. 5, 2005)

This matter is before the Court on the defendants' separate motions to dismiss plaintiff's complaint, pursuant to Rule 12(b)(6), Fed.R.Civ.P. Plaintiff opposes the motions, and the issues are fully briefed.

Plaintiff Arthur J. Misischia, DMD, brings this action pursuant to the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1962 *et seq.*, alleging that his former employers sought to discredit him by placing an inaccurate report in the National Practitioners Data Base ("NPDB") in 1994. He also alleges that, in 2001 and 2002, defendants refused to correct the inaccurate report unless he agreed to demands he characterizes as extortionate. Plaintiff names three groups of defendants: (1) St. John's Mercy Health System, f/k/a St. John's Mercy Medical Center, St. John's Mercy Medical Center Foundation, and St. John's Mercy Health Care, f/k/a Unity Health System (collectively, "the St. John's defendants"); (2) John Farrell, Chief Executive Officer of St. John's during

plaintiff's tenure, his successor, Mark Weber, and Michael W. Noble, DMD, director of the Maxillofacial Surgery Section of the surgery department at St. John's; and (3) St. Louis Oral and Maxillofacial Surgeons, Ltd. ("O & MS"), and John Delfino, DMD, former director of the Maxillofacial Surgery Section at St. John's and president of O & MS. Plaintiff brings three claims under RICO, one claim for conspiracy under Missouri law, and one claim for declaratory and injunctive relief. The three groups of defendants have filed separate motions to dismiss. Defendants argue, *inter alia,* that plaintiff's claims are barred by the doctrine of *res judicata* and by RICO's four-year statute of limitations.

I. Legal Standard

The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is to test the legal sufficiency of the complaint. A complaint is not to be dismissed for failure to state a claim for which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim entitling him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). The factual allegations of a complaint are assumed true and construed in favor of the plaintiff. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). The issue is not whether plaintiff will ultimately prevail, but whether the plaintiff is entitled to present evidence in support of his claim. *Id.* Thus,

> [i]f as a matter of law "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," . . . a claim must be dismissed, without regard to

> whether it is based on an outlandish legal theory or on a close but ultimately unavailing one.

Neitzke v. Williams, 490 U.S. 319, 327 (1989) (quoting *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984)).

In ruling on a motion to dismiss, courts may consider materials that are part of the public record or do not contradict the complaint, as well as materials necessarily embraced by the pleadings. *Porous Media Corp. v. Pall Corp.,* 186 F.3d 1077, 1079 (8th Cir. 1999) (citations omitted). *See also Mattes v. ABC Plastics, Inc.,* 323 F.3d 695, 697 n.4 (8th Cir. 2003) (in deciding motion to dismiss, court may consider the complaint and documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading) (citation omitted). In considering the defendants' motions to dismiss, the Court has reviewed pleadings and orders filed in two previous actions brought by plaintiff. The first action, filed in the Circuit Court of the City of St. Louis in 1994, raised claims arising from plaintiff's suspension and termination. *See Misischia v. St. John's Mercy Medical Center,* 30 S.W.3d 848 (Mo. Ct. App. 2000) (*Misischia I*) (affirming trial court's orders, evidentiary rulings, and verdict). In 2002, plaintiff filed suit in the United States District Court for the District of Columbia, seeking modification of the NPDB report. *See Doe v. Thompson,* 332 F. Supp. 2d 124 (D.D.C. 2004) (dismissing action as time-barred). Both cases are discussed in more detail below.

II. Background

In 1985, plaintiff became a member of St. John's Medical and Dental Staff in oral and maxillofacial surgery.

From July 1, 1986 through July 25, 1994, plaintiff was employed by St. John's as associate director of the Department of Oral and Maxillofacial Surgery residency program. Defendant Delfino was the director of the residency program and chair of Oral and Maxillofacial Surgery. He was also the sole director, shareholder and president of O & MS. On July 1, 1987, plaintiff entered into a contract with O & MS, pursuant to which he conducted a private practice through O & MS for a consideration of 50% of his receipts.

In February 1993, plaintiff began voicing concerns at St. John's staff meetings regarding the quality of training offered to residents. He also asserted that Delfino was achieving poor surgical results and performing unnecessary or excessive surgery. Plaintiff repeatedly urged the Oral Surgery department to enact a quality assurance policy. Plaintiff alleges that Delfino ordered an assistant to alter minutes of meetings at which plaintiff challenged his competence.

On August 13, 1993, Delfino presented plaintiff with a proposed employment contract that altered the termination provision and imposed an onerous non-competition provision. Plaintiff spoke to defendant John Farrell, St. John's Chief Executive Officer, regarding the proposed contract. He also informed Farrell of his concerns regarding Delfino's competence and alleged improper practices. Farrell subsequently met with Delfino and identified plaintiff as a whistle-blower.

In October 1993, a surgical assistant wrote two reports of plaintiff's inappropriate treatment of a patient. According to the first report, on July 23, 1993, plaintiff grabbed and shook the head of a patient who was under

general anesthesia, while swearing at the patient. He then administered an additional bolus of the medication Versed which typically renders a patient amnesic to recent events. The second report stated that on September 27, 1993, plaintiff struck a patient who became combative while emerging from anesthesia.[1] Delfino subsequently identified two additional incidents during which plaintiff allegedly became enraged with staff.

On October 11, 1993, Delfino gave plaintiff one week in which to resign as Associate Director of the residency program. Plaintiff refused to resign and was terminated. On October 27, 1993, St. John's summarily suspended plaintiff's staff privileges. Plaintiff appealed the decision and St. John's appointed an Ad Hoc Investigative Committee (AHIC). After a hearing on November 23, 1993, the AHIC found "one serious incident where in a stressful situation without adequate assistance, plaintiff reacted with excessive physical force in attempting to restrain a patient who was combative while under anesthesia." *Misischia,* 30 S.W.2d at 855-56. The AHIC recommended that the suspension remain in force until plaintiff received a psychiatric determination of fitness. The St. John's board affirmed the decision.

On March 21, 1994, plaintiff saw a psychiatrist jointly selected by him and St. John's. The psychiatrist found that plaintiff was not suffering from any psychiatric disorder. St. John's revoked the summary suspension on April 25, 1994. At the same time, however, it terminated plaintiff's

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[1] Plaintiff did not deny that the two incidents occurred, but challenged the surgical assistant's interpretation of them. *Misischia I,* 30 S.W.3d at 858.

employment contract and staff privileges, effective July 25, 1994. Earlier, on May 2, 1994, defendant Delfino terminated plaintiff's employment with O & MS.

Misischia I

On October 5, 1994, plaintiff filed suit in the Circuit Court of the City of St. Louis against St. John's Mercy Medical Center, John Delfino, and O & MS. Plaintiff brought claims against all defendants for conspiracy to maliciously prosecute (Count I), conspiracy to abuse process (Count II), retaliatory discharge (Count III), slander (Count IV), tortious interference (Count V), and conspiracy to commit the torts alleged in Counts I through V (Count VI). A seventh count for fraud was asserted against defendants Delfino and O & MS.

Plaintiff alleged, as relevant to the present action, that defendants repeatedly informed him that they would not make a report of his summary suspension to the NPDB if he withdrew his request for an appeal of the suspension. He also alleged that St. John's untimely filed the NPDB report of his suspension and advanced the date of the suspension from October 27, 1993, to February 2, 1994, in order to make the report appear to be timely filed. Plaintiff further alleged that, on April 25, 1994, St. John's informed the NPDB that the suspension had been revoked.

The trial court granted St. John's motions to dismiss and for summary judgment on all claims.[2] In February

[2] The trial court found that St. John's was entitled to immunity under the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101 *et seq. Misischia I*, 30 S.W.3d at 858.

1998, plaintiff proceeded to trial against Delfino and O & MS. The jury found in favor of Delfino and O & MS on most claims but awarded plaintiff $265,000 on his fraud claim.[3] The trial court's rulings and the jury verdicts were affirmed on appeal. *Misischia v. St. John's Mercy Medical Center,* 30 S.W.3d 848 (Mo. Ct. App. 2000).

Doe v. Thompson

The NPDB is maintained by the United States Department of Health and Human Services and contains information related to physician competence or conduct which could adversely affect the health or welfare of patients. *Doe v. Thompson,* 332 F. Supp. 2d at 126. Hospitals must report any professional review action that adversely affects the clinical privileges of a physician for more than thirty days. *Id.*

On February 17, 1994, St. John's reported plaintiff's summary suspension to the NPDB. On May 20, 1994, St. John's submitted a revision, stating that, effective April 24, 1994, the suspension had been lifted. The revised report stated:

> This report revises the adverse action report filed 2/17/94, which informed the [NPDB] of the summary suspension of Dr. Doe pending psychiatric evaluation. Based on the receipt of a positive

[3] Plaintiff's contract with O & MS required him to pay fifty percent of his receipts to O & MS. Delfino had untruthfully represented to plaintiff that the payment was to cover O & MS's costs to reimburse St. John's for overhead. St. John's did not require O & MS to pay overhead.

> evaluation, the summary suspension of Dr. Doe has been revoked effective April 25, 1994.

Id. at 126 (revision in original).

Plaintiff argued that the use of the term "positive" was inaccurate in that it indicated that a psychiatric impairment had been found. On March 27, 2002, plaintiff asked HHS to amend the record. On May 3, 2002, acting on the response of HHS, plaintiff applied for Secretarial Review of the report. *Id.* at 126-27.

The Secretary of HHS concluded that the report was inaccurate. The report was amended to read:

> This report revises the adverse action report filed February 17, 1994, which informed the NPDB of the summary suspension of Dr. Doe pending an appropriate evaluation. Based on the receipt of an evaluation that found that Dr. Doe was not suffering from any type of psychiatric disorder, the summary suspension of Dr. Doe has been revoked effective April 25, 1994.

Id. at 127.[4]

Plaintiff continued to object to any reference to a psychiatric evaluation in the NPDB record and filed suit against the Secretary of HHS, pursuant to the Privacy Act, 5 U.S.C. § 552a. He sought, *inter alia,* an order declaring unlawful any further release of information concerning the

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[4] Plaintiff argued that the report should not refer to a psychiatric evaluation because the NPDB Guidebook limited the use of information regarding participation in drug and alcohol treatment programs. The Secretarial Review Decision of October 22, 2004, (Doc. 86, Ex. C) noted that the limitation did not apply to the report at issue because the report did not involve treatment, drugs or alcohol.

fact that he submitted to a psychiatric evaluation, an order directing HHS to reissue a corrected report to all recipients of the earlier versions, expungement of any reference to a psychiatric evaluation, and attorney's fees and costs. *Id.* at 127-28.

The District of Columbia district court determined that plaintiff's action was barred by the Privacy Act's two-year statute of limitations. *Id.* at 132-33. In reaching that conclusion, the court rejected plaintiff's contention that a new cause of action was created each time the DHHS disseminated the inaccurate report. *Id.* at 133. The court held that the two-year limitations period began running in May 1994, when plaintiff received notice of the initial revision submitted by St. John's. *Id.* at 132, 134.

C. Plaintiff's Present Action

Plaintiff filed the present action on August 27, 2004. He alleges that, in 2001 and 2002, defendants refused to correct the NPDB entry and attempted to extort money and unlawful promises from him in exchange for correcting the NPDB report.[5] Plaintiff asserts that, beginning in 1993, defendants engaged in a pattern of racketeering activity actionable under RICO. Defendants argue that plaintiff's claims could and should have been brought in

[5] Counsel for the parties engaged in discussion and correspondence regarding (1) the content of the NPDB report, (2) plaintiff's service as an expert witness in cases against St. John's, and (3) St. John's request for an award of costs against plaintiff. Plaintiff's extortion allegations derive from these discussions among counsel. Plaintiff also contends that counsel for St. John's is a witness to the alleged extortion, by virtue of his participation in those discussions. He separately moves to disqualify counsel.

Misischia I, and thus they are now barred by *res judicata.* Alternatively, they argue that the claims are untimely under RICO's four-year statute of limitations.

In paragraph 224 of his amended complaint, plaintiff alleges that various mailings and interstate wire transmissions were predicate acts constituting a pattern of racketeering activity within the meaning of RICO. The complaint identifies the following mailings and wire transmissions alleged to constitute predicate acts of racketeering activity:

Date	Action
8/28/93	Defendants mailed to plaintiff a letter confirming the suspension of his privileges.
8/28/93	Defendants mailed to plaintiff a second letter requesting his participation in a psychiatric evaluation.
2/2/94	Defendants mailed or wired the initial report to the NPDB.
3/23/94	Defendants caused plaintiff to deliver a letter to the NPDB asking for removal of the initial report.
4/5/94 & 4/20/94	Defendants caused the psychiatrist's report to be mailed to plaintiff.
4/25/94	Defendants caused notice of his termination from St. John's to be mailed to plaintiff.
5/4/94	Defendants caused notice of his termination from O & MS to be mailed to plaintiff.
5/20/94	Defendants mailed or wired the revised report (containing the reference to a "positive" evaluation) to the NPDB.
5/20/94 to 4/16/03	The NPDB report was mailed or wired to third-parties on 61 occasions.

7/25/94 Defendants mailed to plaintiff notice that his staff privileges at St. John's were terminated.

3/6/01 Defendants caused plaintiff to mail a letter demanding defendants revise the NPDB report.

3/28/01 Defendants caused plaintiff to mail a letter to Dr. Michael J. Chehval, president of St. John's medical staff, requesting revision of the NPDB report.

5/14/01 Defendants caused plaintiff to mail a second letter to Dr. Chehval.

6/12/01 Defendants mailed a demand that plaintiff refrain from testifying in malpractice actions against St. John's and pay costs and litigation fees from prior litigation in exchange for modifying the NPDB report.

8/30/01 Defendants mailed to plaintiff another proposed settlement.

9/18/01 Defendants caused plaintiff to mail a letter to Dr. Chehval regarding the improper use of the peer review process to harm plaintiff who was a whistle-blower.

2/15/02 Defendants mailed to plaintiff a substantially similar offer to settle.

3/12/02 Defendants caused plaintiff to mail a dispute initiation form to the NPDB.

2/7/03 Defendants caused HHS to mail a letter to St. John's directing it to revise the NPDB report.

III. Discussion

Res Judicata

A federal court must give a state court judgment the same preclusive effect it would have in the courts of the

rendering state. *See Johnson v. City of Shorewood, Minnesota,* 360 F.3d 810, 818 (8th Cir. 2004). *Res judicata,* commonly referred to as claim preclusion, bars the reassertion of a cause of action that has been previously adjudicated in a proceeding between the same parties or those in privity with them. *Vogt v. Emmons,* 158 S.W.3d 243, 247 (Mo. Ct. App. 2005). The doctrine applies to block a second lawsuit when four elements are the same in both lawsuits: the subject matter, the cause of action, the parties, and the status in which the defendant is sued. *McNeill v. Franke,* 84 F.3d 1010, 1012 (8th Cir. 1996) (citing *King Gen. Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints,* 821 S.W.2d 495, 501 (Mo. 1991)). All four elements are satisfied in this action.

In both *Misischia I* and the present action, plaintiff alleges that the defendants conspired against him in response to his "whistle blowing" and misused the NPDB to damage his reputation. Thus, the subject matter of the two actions is identical.

Plaintiff contends that parties to the two actions are not the same because he added Noble, Farrell, and Weber as defendants in the new action. *Res judicata* may be applied if the new parties are in privity with the defendants in *Misischia I.* Privity, as a basis for satisfying the "same party" requirement of *res judicata,* is premised on the proposition that the interests of the party and non-party are so closely intertwined that the non-party can fairly be considered to have had his or her day in court. *Stine v. Warford,* 18 S.W.3d 601, 605 (Mo. Ct. App. 2000). Farrell and Weber are named by virtue of their positions as CEOs of St. John's; indeed, Weber did not succeed Farrell until after plaintiff was terminated. Noble is named as successor to Delfino as the director of the

Maxillofacial Surgery Section at St. John's. Farrell, Weber, and Noble thus are in privity with St. John's. *See Sumlin v. Krehbiel,* 876 F. Supp. 1080 (E.D. Mo. 1994) (concluding that plaintiff inmates were in privity with inmates in prior action). The parties in the present case are also sued in the same status as in the prior case. *See Barkley v. Carter County State Bank,* 719 S.W.2d 906, 913 (Mo. Ct. App. 1990) (defendant bank named in same status because it was "not, for example, sued in one action as an administrator and in another action merely in its corporate capacity").

Plaintiff contends that the two suits do not raise the same causes of action, because *Misisichia* [sic] *I* raised claims arising from his suspension and termination and the present action raises racketeering claims. *Res judicata* precludes not only those issues on which the court in the former case was required to pronounce judgment, "but to every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, *might have brought forward* at the time." *Chesterfield Village, Inc. v. City of Chesterfield,* 64 S.W.3d 315, 318-19 (Mo. 2002) (emphasis added) (quoting *King Gen. Contractors, Inc.,* 821 S.W.2d at 501)). A court looks to the factual bases for the claims, not the legal theories. *Id.* at 320. *Res judicata* "prevents reassertion of the same claim even though additional or different evidence or legal theories might be advanced to support it." *Id.* at 319-20 (plaintiffs' second suit for damages after action for injunctive relief was barred as arising from same factual basis). *See also Felling v. Giles* 47 S.W.3d 390, 394 (Mo. Ct. App. 2001). ("A cause of action which is single may not be split and either filed or tried piecemeal, and the penalty for

splitting a cause of action is that an adjudication on the merits in the first action is a bar to the second action.")

The test for whether two suits assert the same cause of action is whether the claims arise from the same act, contract, or transaction. *Missouri Real Estate & Insurance Agency, Inc. v. St. Louis County,* 959 S.W.2d 847, 850-51 (Mo. Ct. App. 1997). *See also Daley v. Marriott International, Inc.,* No. 04-2643 at 10, slip opinion (8th Cir. July 25, 2005) (second law suit is precluded if claims arise out of same nucleus of operative facts as prior claim). "In the final analysis the test would seem to be whether the wrong for which redress is sought is the same in both actions." *Id.* at 11 (quoting *Roach v. Teamsters Local Union No. 688,* 595 F.2d 446, 449 (8th Cir. 1979)).

The claims in *Misischia I* and the present action all arose from the same series of transactions or acts: Plaintiff challenged the quality of the training in the residency program and the necessity and quality of surgery performed by Dr. Delfino. He was reported to the peer review process based on reports that he mishandled patients, and was summarily suspended. A report was made to the NPDB and was subsequently revised; the revision was misleading and created the erroneous impression that plaintiff suffered from a psychiatric impairment. The Court notes that, despite knowing the contents of the disputed revision when he filed *Misischia I,* plaintiff chose not to challenge the report in that lawsuit.

Plaintiff argues that he did not have a cause of action under RICO until the defendants, as a condition to modifying the NPDB report, attempted to extort his agreement to pay litigation costs from *Misischia I* and to refrain from

appearing as an expert witness. Thus, he contends, *res judicata* does not bar this action.

To state a RICO claim, plaintiff must show (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Wisdom v. First Midwest Bank of Poplar Bluff,* 167 F.3d 402, 406 (8th Cir. 1999). The pattern element requires at least two acts of racketeering activity. *Id.*; 18 U.S.C. § 1961(5). Mail fraud and wire fraud are among the predicate acts that can form the basis of a RICO claim. § 1961(1). Plaintiff's amended complaint identifies several instances of alleged mail or wire fraud that occurred before he filed *Misischia I.* His allegation of additional acts after the disposition of *Misisichia* [sic] *I* does not alter the fact that the basis for his racketeering claims existed during the pendency of that prior case. *See Daley* at *11 (subsequent actions by defendants did not create new cause of action because they arose from the same nucleus of operative facts as first action).

Plaintiff contends that St. John's has conceded that his current law suit does not arise from the same transaction as *Misischia I.* This contention is based on St. John's action in state court to limit its obligation to indemnify defendant Delfino, pursuant to its separation agreement with Delfino. St. John's indemnification action does not have any bearing on the *res judicata* analysis.

The Court concludes that plaintiff's federal and state claims in this action are barred by the doctrine of *res judicata.*

Statute of Limitations

Civil RICO actions must be brought within four years. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.,*

483 U.S. 143 (1987). This action was filed on August 27, 2004. In order to be timely, therefore, plaintiff must establish that the limitations period did not begin to run until August 27, 2000. The limitations period begins to run when a plaintiff knows or should have known of the injury. *Rotella v. Wood,* 528 U.S. 549 (2000). The Supreme Court has expressly rejected an approach that delays the start of the limitations period until the plaintiff discovers both the injury and the pattern of racketeering. *Id.*

Plaintiff contends that, under *Rotella,* the statutory period does not begin to run until a second racketeering act completes the cause of action. Here, he argues, the second act did not occur until defendants allegedly attempted to extort money and promises from him in 2001 and 2002. Plaintiff's argument ignores the numerous predicate acts alleged in his complaint that occurred before he filed *Misischia I.* Plaintiff argues, without explanation, that all of the acts of alleged wire or mail fraud occurring before 2001 constitute a single predicate act. The Court sees no basis for so finding.

Plaintiff argues that the four-year statutory period has not run because he alleges multiple distinct injuries. However, "non-independent injuries will not cause a new limitations period to accrue." *Bingham v. Zolt,* 66 F.3d 553, 560 (2nd Cir. 1995). All of plaintiff's alleged injuries-his suspension and dismissal, the misleading report to the NPDB, the dissemination of that report to third parties, and the alleged attempt to use the NPDB report to coerce his cooperation-occurred prior to August 27, 2000. Defendants' actions after August 27, 2000, are more properly characterized as new predicate acts, rather than new injuries. Plaintiff's claims under RICO are barred by the four-year statute of limitations.

In conclusion, the Court holds that plaintiff's claims against all defendants are barred by *res judicata*. Alternatively, the Court holds that plaintiff's claims under RICO are time-barred and the Court declines to exercise supplemental jurisdiction over plaintiff's state law claims.

Accordingly,

IT IS HEREBY ORDERED that the motion of defendants John Delfino and St. Louis Oral & Maxillofacial Surgeons, Ltd., to dismiss for failure to state a claim [# 27] is **granted**.

IT IS FURTHER ORDERED that the motion of defendants John Farrell, Michael Noble, and Mark Weber to dismiss [# 37] is **granted**.

IT IS FURTHER ORDERED that the motion of defendants St. John's Mercy Health Care, St. John's Mercy Health System, and St. John's Mercy Medical Center Foundation to dismiss [# 40] is **granted**.

IT IS FURTHER ORDERED that plaintiff's motion to disqualify counsel [# 31] is **denied as moot**.

IT IS FURTHER ORDERED that the motion of the St. John's defendants to strike plaintiff's response or, in the alternative for leave to file a sur-reply [# 86] is **denied as moot.**

A separate order of dismissal will be entered this same date.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 5th day of August, 2005.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DR. ARTHUR J. MISISCHIA, DMD,	)	
Plaintiff,	)	No. 4:04-CV-1161 (CEJ)
vs.	)	
ST. JOHN'S MERCY HEALTH, SYSTEM, et al.,	)	
Defendants.	)	

ORDER OF DISMISSAL

(Filed Aug. 5, 2005)

In accordance with the Memorandum and Order entered this same date,

IT IS HEREBY ORDERED that the amended complaint of Dr. Arthur J. Misischia, DMD, is **dismissed with prejudice** pursuant to Rule 12(b)(6) for failure to state a claim. Plaintiff shall bear costs.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 5th day of August, 2005.